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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting	)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the	)	
Communications Act of 1934, as amended	)	

PETITION FOR RECONSIDERATION

Teleport Communications Group Inc. ("TCG"), pursuant to Section 1.429 of the Commission's Rules, hereby requests that the Commission reconsider its Order in the captioned proceeding to the extent it permits affiliates of regional Bell Operating Companies ("RBOCs") to provide both local exchange service and in-region, interLATA service.[1] The provision of local exchange service and in-region, interLATA service by RBOC affiliates clearly violates the statutory separate affiliate requirement which specifies that an RBOC cannot provide interLATA service along with intraLATA services. Each of these services must be provided by separate entities. The Commission's conclusion that an affiliate entity can provide both interLATA and intraLATA services threatens the ability of the section 272 affiliate to "operate independently" from the RBOC as required under section 272(b)(1).

[1] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, Order, FCC 96-489 (rel. December 24, 1996) at ¶¶ 309-317, 62 Fed. Reg. 2927 (January 21, 1997) ("Order").

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Moreover, the Commission has based its conclusion that the section 272 affiliate should be able to provide local and interLATA services on a determination that non-accounting safeguards are adequate to guard against violations of the separate affiliate requirement. However, the stated safeguards are vague and inadequate to accomplish their intended purpose.

Sections 271 and 272 of the 1996 Act set the general parameters for RBOC entry into the interLATA market and are intended to prevent cross-subsidization between the RBOCs' local and interLATA services, which would threaten the vitality of local exchange service competition. As the Commission correctly observed in its NPRM, an RBOC that offers vertically integrated local exchange and interLATA services may circumvent section 272 safeguards by transferring transmission facilities and capabilities to an affiliate.[2/] Although the Commission has prohibited the sharing of such facilities, TCG submits that the Commission should be just as concerned with the provision by RBOC affiliates of in-region, interLATA service and local exchange service. Restriction on the joint use of transmission facilities will be an essential safeguard against cross-subsidy,[3/] but it is insufficient if RBOCs are permitted to circumvent those safeguards by providing

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[2/] See id. at ¶ 301; see also NPRM at ¶ 70. The Commission has correctly determined that the transfer of local exchange and exchange access facilities and capabilities to an affiliate would make the affiliate a successor or assign subject to section 272. Order at ¶ 309. TCG agrees with the Commission that this is the appropriate result even if the transfer is indirect, i.e., by way of an intermediate affiliate.

[3/] Id. at ¶¶ 158-61.

interLATA and non-facilities-based local exchange service through the same affiliate.

I. RBOCs SHOULD NOT BE PERMITTED TO CIRCUMVENT THE SEPARATE AFFILIATE REQUIREMENT

The RBOCs' interpretation of the statute that has been adopted by the Commission turns the 1996 Act on its head by allowing the RBOCs to evade the mandate that the RBOCs keep their interLATA and local exchange operations separate. This decision has the result of reinstituting the same structure that Congress had specifically prohibited by section 272(a). Pursuant to this section, a in-region, interLATA service can only be provided through a separate affiliate for a period of three years once section 271 approval is obtained. This separation is intended to prevent the affiliate from exerting market dominance through its provision of in-region, interLATA service and local service.

However, the Commission has concluded that "section 272 does not prohibit a section 272 affiliate from providing local exchange services in addition to interLATA services, nor can such a prohibition be read into this section."[4/] According to the Commission's analysis, unless the affiliate itself is a carrier subject to the requirements of section 251(c), then it can provide both local exchange and in-region, interLATA service. This reading of the statute is clearly erroneous for it would allow the RBOCs to provide prohibited combined interLATA

[4/] Id. at ¶ 312 (footnote omitted).

and local exchange service through the mere artifice of a separate subsidiary, which is contrary to Congress' intent.

It is clear that the RBOCs could engage in a variety of practices that would thwart the purpose of the separate subsidiary requirement.[5] The Commission has prohibited the joint ownership and operation of transmission facilities by the RBOC and its affiliate,[6] but the RBOCs could transfer bottleneck facilities to the affiliate.[7] If an RBOC transfers local exchange and exchange access facilities and capabilities to an affiliate,[8] then the affiliate becomes an assign of the RBOC and is then subject to the same regulatory restrictions under sections 271 and 272 as the RBOC. However, this "safeguard" provides little or no protection against non-discriminatory behavior.

Violations by affiliates or "assigns" may be difficult to detect.[9] The RBOCs can use layers of unregulated affiliates that do not provide services to end users to provide services to the section 272 affiliate, thereby discriminating in their favor as compared to the rates, terms, and conditions that may be offered by the RBOC to

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[5] See, e.g., TCG ex parte at 3-5 (describing Ameritech's layered affiliate structure).

[6] Order at ¶ 158.

[7] Such transactions, if conducted on an arm's-length basis, have not been prohibited by the Commission. Id.

[8] The Commission declined to impose an absolute prohibition on such transfers. Id. at ¶ 310.

[9] As TCG has reported, the layers of affiliates created by Ameritech makes it difficult to assess compliance with the separate affiliate safeguards. TCG ex parte at 3-5 (dated October 8, 1996).

other competitors. As TCG has explained in this proceeding, some RBOCs have already engaged in a strategy to circumvent the separate affiliate requirement of section 272(a).[10] This tactic is an attempt by RBOCs to achieve through an affiliate what the RBOCs themselves cannot — engage in offering long distance and local exchange service in the same area by the same entity.

Although some RBOCs have already telegraphed their intention to provide local exchange service and in-region, interLATA service from the same entity prior to the sunset of the separate affiliation rules, the Commission has erroneously declined to promulgate regulations policing such RBOC activities. The only guaranteed safeguard is the complete prohibition on a section 272 affiliate from providing local service. TCG thus urges the Commission to find that an RBOC affiliate that provides in-region, interLATA service may not also provide local exchange service.

II. EXISTING "SAFEGUARDS" ARE INSUFFICIENT TO PREVENT CROSS-SUBSIDIZATION

The Commission has decided that a few existing "safeguards" may prevent RBOC affiliates offering integrated services from engaging in unjust and unreasonable practices. However, these safeguards fall far short of the separate affiliate and additional 272 requirements that Congress saw fit to institute in the

[10] In California, Michigan, Wisconsin, Illinois, and Ohio, affiliates of Pacific Bell and Ameritech have applied to the respective state commissions to provide interLATA, intraLATA toll, and local exchange services.

1996 Act. Therefore, the Commission's finding with regard to this issue is contrary to the 1996 Act.

The Commission has referred to a number of existing "safeguards" which it believes will protect against discrimination under the integrated affiliate service offerings it has approved. For example, the Commission states that RBOC interLATA service affiliates may be subject to "corresponding nondiscrimination obligations that state statutes and regulations typically impose on common carriers," concluding that "these existing requirements should be adequate to protect competition and consumers against anticompetitive conduct by a BOC section 272 affiliate."[11/] This conclusion, however, rests on the assumption that states' regulations are sufficiently adequate and consistent. This is not necessarily true. For example, TCG has found that Illinois imposes virtually no regulatory controls on an affiliate that offers resale, even when that affiliate provides the service in part over its own facilities.[12/] Moreover, the streamlined regulations in effect in the various states differ in their level and type of regulation.[13/] Thus, the Commission's reliance on state regulation does not provide an effective enforcement mechanism and is inconsistent with Congress' determination that the RBOC must not be permitted — even through a separate affiliate — to provide

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[11/] Order at ¶ 311.

[12/] See TCG ex parte at 6 (dated October 8, 1996).

[13/] For example, Illinois' streamlined regulation is based on the type of service offered, rather than the type of carrier.

integrated local exchange and in-region, interLATA services for three years after it receives approval under section 271 to offer in-region, interLATA service.

The Commission also found that sections 251 and 252 provide safeguards to address concerns regarding discrimination when an RBOC provides network elements or resold services to an affiliate. It classified as speculative those arguments asserting that "opportunities for discrimination and cross-subsidy are greater when the BOC provides network elements to its affiliate than when it provides resold services."[14] However, if such arguments were truly only conjecture, then Congress would have had no need to adopt a separate affiliate requirement, because RBOCs presumably would have been restrained either by any number of existing sections or safeguards related to nondiscriminatory or unreasonable behavior.[15] In enacting the section 272 separate affiliate requirement, Congress conveyed its belief that more stringent protections were necessary to protect against the exercise of market dominance to the detriment of competition once an RBOC provides in-region, interLATA service.

The Commission has concluded that prohibiting an RBOC section 272 affiliate from providing local exchange service would not serve the public interest because the "increased flexibility resulting from the ability to provide both interLATA and local services from the same entity" results in flexibility that

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[14] Order at ¶ 314.

[15] The Commission cites as examples sections 251, 252, and 202, and its affiliate transaction rules and the rules promulgated in its first and second Interconnection Orders as protecting against discriminatory behavior. Id. at ¶ 315.

encourages "innovative new services."[16] However, given that the RBOC is prohibited from sharing facilities with the 272 affiliate,[17] the only innovative new services that may be expected to arise out of such a pairing would involve the bundling and packaging of services created through marketing efforts. Such efforts, however, would not be undermined by prohibiting a section 272 affiliate from providing local exchange service because the Commission has approved the sharing of marketing facilities between the RBOC and its affiliate.[18] Therefore, the RBOC and its affiliate can still retain the flexibility to offer new, bundled services using shared marketing facilities. Maintaining a distinct section 272 affiliate that provides only in-region, interLATA service for the required period of time does not foreclose the flexibility to provide new service offerings and is the only way that discriminatory behavior to the detriment of local competition can be prevented.

16/ Id. at ¶ 315.

17/ Section 272(b)(1) requires that the section 272 affiliate operate independently from the RBOC. The Commission has appropriately determined that this requirement "precludes the joint ownership of transmission and switching facilities by a BOC and its section 272 affiliate, as well as the joint ownership of the land and buildings where those facilities are located." Id. at ¶ 158.

18/ Id. at ¶ 162 ("We find that joint ownership of . . . office space and equipment used for marketing . . . may provide economies of scale and scope without creating the same potential for discrimination by the BOCs.").

CONCLUSION

For the reasons stated above, TCG requests that the Commission reconsider its decision permitting RBOC section 272 affiliates to provide local exchange service. By providing in-region, interLATA service and local exchange service through a single entity, the RBOCs could to circumvent the separate affiliate requirements of section 272 to the detriment of the development of local competition. Therefore, the Commission should find that the section 272 affiliate can only provide in-region, interLATA service.

Respectfully submitted,

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